Dato' Seri Timor Shah Rafiq v Nautilus Tug & Towage Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCC-629–11 OF 2023
ATAN MUSTAFFA J
23 MAY 2024

Companies and Corporations — Derivative action — Application for leave to commence — Plaintiff as defendant's director filed application for leave to commence derivative action against majority directors of defendant — Dissatisfaction over excessive, unsubstantiated and unjustified monthly management fees paid by defendant to its holding company — Whether test for leave to commence derivative action had been satisfied — Whether plaintiff estopped from seeking documentary proof to justify increased management fees — Whether there was inordinate or unreasonable delay in pursuing derivative action — Whether derivative action was abuse of court process because plaintiff sought to access privileged information — Whether derivative action was abuse of court process as it would give rise to multiplicity of proceedings — Whether derivative action would cause defendant to adopt position contradictory to another suit — Whether court should allow plaintiff's application for order that management fees be reduced pending final resolution of derivative action — Companies Act 2016 ss 347, 348(4) & 350

The plaintiff, a director of Nautilus Tug & Towage Sdn Bhd ('the defendant') had filed the present application ('encl 1') for leave to commence a derivative action on behalf of the defendant pursuant to ss 347 and 348 of the Companies Act 2016 ('Act 777') premised on the argument, inter alia, that the quantum of monthly management fees paid by the defendant to its holding company, Azimuth Marine Sdn Bhd ('AMSB') which had increased from USD8,000 to USD40,000 and later to USD60,000 per month, were grossly excessive, unsubstantiated and unjustified. Further, under prayer 2(c) of encl 1, the plaintiff sought an order of the court that the management fees payable by the defendant to AMSB be reduced to USD8,000 per month pending the final resolution of the derivative action. In deciding encl 1, the court had considered: (a) whether the test for leave to commence a derivative action had been satisfied; and (b) the grounds raised by the majority directors of the defendant in resisting encl 1 — in this regard, the majority directors submitted that: (i) the plaintiff, having agreed to the conditional increase in management fees at the board meeting on 2 November 2016, was estopped from questioning the quantum of the fees and demanding documentary proof to justify the same for the period post 30 September 2017; (ii) there had been an inordinate and unreasonable delay of six years on the part of the plaintiff in pursuing the present action since he first challenged the increase in management fees on

14 November 2017; (iii) the plaintiff's intended derivative action was an abuse of process as he was purportedly seeking to access privileged information pertaining to the defendant's conduct in the plaintiff's lawsuits; (iv) the plaintiff's intended derivative action was an abuse of process as it would give rise to multiplicity of proceedings, since the issue of the legitimacy of the management fees was already a live issue before the Court of Appeal in the defendant's pending appeal against the dismissal of Suit No WA-22NCC-163–05 of 2017 ('Suit 163'); and (v) the plaintiff's intended derivative action would cause the defendant to adopt a position on the legitimacy of the management fees that was contradictory to the stand it had taken in Suit 163 and this would severely prejudice the defendant's appeal against the dismissal of Suit 163 as it would effectively be an admission by the defendant that it had previously advanced a case on the management fees that was palpably unsustainable.

Held, allowing encl 1:

(1) The plaintiff had satisfied the test for leave to commence a derivative action under s 348(4) of Act 777. The plaintiff had demonstrated that he was acting in good faith and that it appeared prima facie to be in the best interest of the defendant for leave to be granted. Based on the evidence, there were overwhelming grounds for the plaintiff to honestly believe that the defendant had good causes of action against the majority directors for breaches of their statutory and fiduciary duties in causing the defendant to make unsubstantiated payments to AMSB, and against AMSB for unjust enrichment at the defendant's expense. The objective component of the 'honest belief' requirement was also satisfied as the court found that a reasonable person in the plaintiff's position could hold such beliefs. On the element of collateral purpose, the court found that the plaintiff was not pursuing the intended derivative action for any ulterior motive unrelated to the defendant's interests, instead, the objective evidence demonstrated that the plaintiff brought this application as a last resort after exhausting all avenues to seek redress on the defendant's behalf (see paras 3, 5 & 7–9).

(2) Based on the exact terms of the board's resolution on 2 November 2016, the plaintiff's agreement to increase the management fee was clearly temporal in nature, limited to one year with the condition that it would be reviewed for subsequent years. The court disagreed with the majority directors' position that directors were perpetually estopped from requesting the management fees to be proven and substantiated, just because an increase was previously approved by the board. This would lead to perverse outcomes whereby a company would be forever bound by an unsubstantiated increase in fees regardless of whether it was justified. The contemporaneous documentary evidence overwhelmingly supported the plaintiff's contention that he had at all material times been

steadfast in his stand that the quantum of management fees paid to AMSB must be fully justified by reference to the actual work done. Even if there was any ambiguity in the construction of the board resolution, the benefit of the doubt must be accorded to the plaintiff who was merely seeking to uphold principles of good corporate governance. On totality, the plaintiff was not estopped, either in law or in fact, from seeking documentary proof to justify the increased management fees charged by AMSB to the defendant for the period post 30 September 2017 (see paras 14, 17 & 23–25).

(3) On a holistic consideration of the evidence, the court found that the plaintiff had at all times acted with alacrity and probity in seeking to bring the majority directors to account. The meticulously documented chronology of the plaintiff's endeavours to obtain answers from the majority directors both at formal board meetings and through informal correspondence left no room for doubt as to the plaintiff's good faith in commencing this action. The six-year period between the plaintiff's first complaint and the institution of the originating summons was a consequence of the majority directors' obduracy, not the plaintiff's indolence. Therefore, the court found that there had been no inordinate or unreasonable delay on the plaintiff's part in commencing the present action which would constitute an abuse of process (see paras 35 & 38).

(4) The majority directors' contention that the plaintiff's intended derivative action amounted to an abuse of process aimed at obtaining privileged information was not well-supported. This appeared to be a diversion from the core matters under dispute before the court. The said contention which was never once raised contemporaneously but advanced for the first time in these proceedings, was an afterthought that was factually and legally unsustainable. The plaintiff had amply demonstrated that the documents sought in the intended derivative action were all in the nature of routine commercial records that did not attract privilege. The court did not find the majority directors' assertion of privilege as grounds to avoid providing justification for the substantial increase in management fees to be a convincing position. Transparency on this issue seemed warranted. Accordingly, this argument was dismissed (see para 48).

(5) The court found that the intended derivative action was not duplicitous of Suit 163 as they were grounded on different causes of action and sought disparate reliefs. Suit 163 was premised on establishing a conspiracy to injure the defendant and a breach of directors' duties arising from certain pleaded acts, of which the increase in management fees was but one of the alleged consequences. The intended derivative action on the other hand was a direct challenge by the plaintiff on behalf of the defendant against the majority directors for breaching their

fiduciary duties in approving the exponential increase in management fees without any commercial justification. The intended derivative action also sought to recover the unsubstantiated increase in management fees in its entirety from April 2017 to date as opposed to only a limited period from October 2017 to January 2019 as claimed in Suit 163. On totality, the majority directors had failed to demonstrate any abuse of process or risk of multiplicity arising from the intended derivative action (see paras 56, 59 & 61).

(6) There was no reasonable basis for concluding that the defendant would be prejudiced in defending the appeal in Suit 163 by taking the correct position in the intended derivative action that the increase in management fees paid to AMSB was indefensible. The claim for additional management fees had already been dismissed by the High Court in Suit 163 and did not arise in the pending appeal. In any event, there was clear evidence that the payments were wholly unjustified and therefore, the defendant could not be prevented from abandoning its previous erroneous stance and adopting the right position. The majority directors who were responsible for committing the defendant to an untenable position in Suit 163 could not be heard to complain of prejudice. On totality, the court found that the majority directors had failed to demonstrate any prejudice to the defendant in the appeal in Suit 163 arising from the intended derivative action (see paras 71–72).

(7) Given the plaintiff's unrelenting but futile efforts to procure documentary proof that the quantum of fees paid was justified, there was a real risk of the defendant's assets being improperly depleted in the event the derivative action succeeded. An order for the management fees payable to AMSB to be reduced to USD8,000 per month pending the disposal of the derivative action as per prayer 2(c) would prevent this risk from materializing. It would also ensure that the directors did not benefit from their own breaches pending a resolution of the matter. For the foregoing reasons, the court was satisfied that it was fair, appropriate and in the best interest of the defendant to allow prayer 2(c) of encl 1. Such an order fell within the wide powers conferred on the court by s 350 of Act 777 and was consonant with the objectives of the statutory derivative action (see paras 79 & 81).

[Bahasa Malaysia summary

Plaintif yang merupakan pengarah bagi Nautilus Tug & Towage Sdn Bhd ('defendan') telah memfailkan permohonan semasa ('lampiran 1') untuk kebenaran bagi memulakan tindakan terbitan bagi pihak defendan menurut ss 347 dan 348 Akta Syarikat 2016 ('Akta 777') berasaskan hujah, antara lain, bahawa kuantum fi pengurusan bulanan yang dibayar oleh defendan kepada syarikat induknya, Azimuth Marine Sdn Bhd ('AMSB') yang telah meningkat daripada USD8,000 kepada USD40,000 dan kemudiannya kepada

USD60,000 sebulan, adalah terlalu berlebihan, tidak berasas dan tidak wajar. Selanjutnya, di bawah permohonan 2(c) lampiran 1, plaintif memohon perintah mahkamah supaya fi pengurusan yang perlu dibayar oleh defendan kepada AMSB dikurangkan kepada USD8,000 sebulan sementara menunggu penyelesaian muktamad tindakan terbitan. Dalam memutuskan lampiran 1, mahkamah telah mempertimbangkan: (a) sama ada ujian untuk kebenaran bagi memulakan tindakan terbitan telah dipenuhi; dan (b) alasan-alasan yang dibangkitkan oleh pengarah-pengarah majoriti defendan dalam menentang lampiran 1 — dalam hal ini, pengarah-pengarah majoriti berhujah bahawa: (i) plaintif, setelah bersetuju dengan kenaikan bersyarat fi pengurusan pada mesyuarat lembaga pengarah pada 2 November 2016, telah dihalang daripada mempersoalkan kuantum bagi fi tersebut dan menuntut bukti dokumentar untuk mewajarkan kenaikan tersebut untuk tempoh selepas 30 September 2017; (ii) terdapat kelewatan yang melampau dan tidak munasabah selama enam tahun di pihak plaintif dalam meneruskan tindakan semasa sejak dia mula mencabar kenaikan fi pengurusan pada 14 November 2017; (iii) tindakan terbitan yang ingin difailkan oleh plaintif adalah penyalahgunaan proses kerana dia kononnya ingin mengakses maklumat terlindung yang berkaitan dengan tindakan defendan dalam tuntutan mahkamah plaintif; (iv) tindakan terbitan yang ingin difailkan oleh plaintif adalah penyalahgunaan proses kerana ia akan menimbulkan penduaan prosiding, memandangkan isu keabsahan fi pengurusan sudah menjadi isu langsung di hadapan Mahkamah Rayuan dalam rayuan defendan yang belum selesai terhadap penolakan No Guaman WA-22NCC-163–05 Tahun 2017 ('Guaman 163'); dan (v) tindakan terbitan yang ingin difailkan oleh plaintif akan menyebabkan defendan untuk menerima pakai pendirian mengenai keabsahan fi pengurusan yang bercanggah dengan pendirian yang telah diambilnya dalam Guaman 163 dan ini akan menjejaskan rayuan defendan terhadap penolakan Guaman 163 kerana ia secara kesannya akan menjadi pengakuan oleh defendan bahawa ia sebelum ini telah mengemukakan kes mengenai fi pengurusan yang nyata tidak mampan.

Diputuskan, membenarkan lampiran 1:

(1) Plaintif telah memenuhi ujian untuk kebenaran bagi memulakan tindakan terbitan di bawah s 348(4) Akta 777. Plaintif telah menunjukkan bahawa dia bertindak dengan suci hati dan sepertinyanya pemberian kebenaran tersebut adalah prima facie untuk kepentingan terbaik defendan. Berdasarkan keterangan, terdapat alasan yang kukuh untuk plaintif mempercayai secara jujur bahawa defendan mempunyai kausa tindakan yang mampan terhadap pengarah-pengarah majoriti tersebut berdasarkan pelanggaran kewajipan berkanun dan fidusiari mereka dalam menyebabkan defendan membuat pembayaran yang tidak berasas kepada AMSB, dan terhadap AMSB untuk pengayaan yang tidak adil di atas perbelanjaan defendan. Komponen objektif keperluan

'kepercayaan jujur' juga dipenuhi kerana mahkamah mendapati bahawa orang yang munasabah dalam kedudukan plaintif boleh mempunyai kepercayaan tersebut. Mengenai elemen tujuan kolateral, mahkamah mendapati bahawa plaintif tidak memfailkan tindakan terbitan tersebut untuk apa-apa motif tersembunyi yang tidak berkaitan dengan kepentingan defendan, sebaliknya, keterangan objektif menunjukkan bahawa plaintif memfailkan permohonan ini sebagai pilihan terakhir selepas kehabisan semua jalan untuk mendapatkan ganti rugi bagi pihak defendan (lihat perenggan 3, 5 & 7–9).

(2) Berdasarkan terma-terma sebenar resolusi lembaga pengarah pada 2 November 2016, persetujuan plaintif untuk menaikkan fi pengurusan adalah jelas bersifat sementara, terhad kepada satu tahun dengan syarat ia akan dikaji semula untuk tahun-tahun berikutnya. Mahkamah tidak bersetuju dengan pendirian pengarah-pengarah majoriti bahawa pengarah-pengarah akan sentiasa dihalang daripada meminta agar fi pengurusan dibuktikan dan diverifikasikan, hanya kerana kenaikan telah diluluskan oleh lembaga pengarah sebelum ini. Ini akan membawa kepada hasil yang tidak masuk akal di mana syarikat akan selama-lamanya terikat dengan kenaikan fi yang tidak berasas tanpa mengira sama ada ia wajar. Keterangan dokumentar kontemporari sangat menyokong dakwaan plaintif bahawa beliau pada setiap masa material telah berpegang teguh pada pendiriannya bahawa kuantum fi pengurusan yang dibayar kepada AMSB perlu dibuktikan sepenuhnya dengan merujuk kepada kerja sebenar yang dilakukan. Jika pun terdapat apa-apa kekaburan dalam pentafsiran resolusi lembaga pengarah tersebut, faedah kesangsian mesti diberikan kepada plaintif yang semata-mata ingin menegakkan prinsip tadbir urus korporat yang baik. Secara keseluruhan, plaintif tidak dihalang, sama ada dari segi undang-undang atau fakta, daripada mendapatkan keterangan dokumentar yang mewajarkan kenaikan fi pengurusan yang dikenakan oleh AMSB kepada defendan untuk tempoh selepas 30 September 2017 (lihat perenggan 14, 17 & 23–25).

(3) Berdasarkan pertimbangan holistik ke atas keterangan, mahkamah mendapati bahawa plaintif pada setiap masa telah bertindak dengan pantas dan berhemah dalam usaha untuk membawa pengarah-pengarah majoriti tersebut ke muka pengadilan. Kronologi yang didokumentasikan dengan teliti mengenai usaha plaintif untuk mendapatkan jawapan daripada pengarah-pengarah majoriti tersebut baik pada mesyuarat lembaga pengarah rasmi dan melalui surat-menyurat tidak rasmi tidak meninggalkan ruang untuk keraguan tentang niat murni plaintif dalam memulakan tindakan ini. Tempoh enam tahun antara aduan pertama plaintif dan pemfailan saman pemula tersebut adalah akibat daripada kedegilan pengarah-pengarah majoriti tersebut, bukan disebabkan oleh kemalasan plaintif. Oleh itu,

mahkamah mendapati bahawa tidak ada kelewatan yang melampau atau tidak munasabah di pihak plaintif dalam memulakan tindakan semasa yang akan membawa kepada penyalahgunaan proses (lihat perenggan 35 & 38).

(4) Dakwaan pengarah-pengarah majoriti bahawa tindakan terbitan yang ingin difailkan oleh plaintif adalah penyalahgunaan proses yang bertujuan untuk mendapatkan maklumat terlindung adalah tidak disokong dengan baik. Ini kelihatannya melencong daripada perkara teras yang dipertikaikan di hadapan mahkamah. Dakwaan tersebut yang tidak pernah dibangkitkan secara kontemporari tetapi dikemukakan buat kali pertama dalam prosiding ini, adalah pemikiran terkemudian yang tidak dapat dipertahankan dari segi fakta dan undang-undang. Plaintif telah menunjukkan dengan secukupnya bahawa semua dokumen yang diminta dalam tindakan terbitan yang ingin difailkan adalah berbentuk rekod komersial rutin yang tidak berkaitan dengan keistimewaan. Mahkamah tidak mendapati bahawa dakwaan pengarah-pengarah majoriti tersebut mengenai keistimewaan sebagai alasan untuk mengelak daripada memberikan justifikasi untuk kenaikan besar dalam fi pengurusan sebagai satu pendirian yang meyakinkan. Ketelusan mengenai isu ini nampaknya adalah diperlukan. Sehubungan itu, hujah ini telah ditolak (lihat perenggan 48).

(5) Mahkamah mendapati bahawa tindakan terbitan yang ingin difailkan adalah tidak menduplikasi Guaman 163 kerana ia berdasarkan kausa tindakan yang berbeza dan memohon relif yang berbeza. Guaman 163 adalah berdasarkan pembuktian konspirasi untuk mencederakan defendan dan pelanggaran kewajipan pengarah-pengarah yang berpunca daripada tindakan-tindakan tertentu yang didakwa, yang mana kenaikan dalam fi pengurusan hanyalah salah satu daripada akibat yang didakwa. Tindakan terbitan yang ingin difailkan sebaliknya adalah cabaran langsung oleh plaintif bagi pihak defendan terhadap pengarah-pengarah majoriti kerana melanggar kewajipan fidusiari mereka dalam meluluskan kenaikan eksponen fi pengurusan tanpa apa-apa justifikasi komersial. Tindakan terbitan yang ingin difailkan itu juga bertujuan untuk mendapatkan semula keseluruhan kenaikan tidak berasas dalam fi pengurusan tersebut dari April 2017 hingga kini berbanding hanya tempoh terhad dari Oktober 2017 hingga Januari 2019 seperti yang dituntut dalam Guaman 163. Secara keseluruhan, pengarah-pengarah majoriti telah gagal menunjukkan apa-apa penyalahgunaan proses atau risiko kependuaan yang timbul daripada tindakan terbitan yang ingin difailkan (lihat perenggan 56, 59 & 61).

(6) Tiada asas yang munasabah untuk membuat kesimpulan bahawa defendan akan diprejudiskan dalam mempertahankan rayuan dalam Guaman 163 dengan mengambil kedudukan yang betul dalam tindakan

terbitan tersebut bahawa kenaikan dalam fi pengurusan yang dibayar kepada AMSB adalah tidak dapat dipertahankan. Tuntutan untuk fi pengurusan tambahan telah pun ditolak oleh Mahkamah Tinggi dalam Guaman 163 dan tuntutan tersebut tidak timbul dalam rayuan bagi Guaman 163 yang belum selesai. Walau apa pun, terdapat keterangan jelas bahawa pembayaran tersebut tidak wajar sepenuhnya dan oleh itu, defendan tidak boleh dihalang daripada meninggalkan pendiriannya yang salah sebelum ini dan menerima pakai kedudukan yang betul. Pengarah-pengarah majoriti yang bertanggungjawab untuk meletakkan defendan pada kedudukan yang tidak boleh dipertahankan dalam Guaman 163 tidak berhak untuk mengadu tentang prejudis. Secara keseluruhannya, mahkamah mendapati bahawa pengarah-pengarah majoriti tersebut telah gagal untuk menunjukkan apa-apa prejudis yang akan berlaku kepada defendan dalam rayuan bagi Guaman 163 akibat daripada tindakan terbitan yang ingin difailkan (lihat perenggan 71–72).

(7) Memandangkan usaha plaintif yang tidak putus-putus tetapi sia-sia untuk mendapatkan bukti dokumentar bahawa kuantum fi yang dibayar adalah wajar, terdapat risiko sebenar aset defendan akan habis secara tidak wajar sekiranya tindakan terbitan tersebut berjaya. Perintah supaya fi pengurusan yang perlu dibayar kepada AMSB dikurangkan kepada USD8,000 sebulan sementara menunggu pelupusan tindakan terbitan seperti dalam permohonan 2(c) akan menghalang risiko ini daripada menjadi kenyataan. Ia juga akan memastikan bahawa para pengarah tidak mendapat manfaat daripada pelanggaran mereka sendiri sementara menunggu penyelesaian perkara tersebut. Atas sebab-sebab di atas, mahkamah berpuas hati bahawa adalah adil, wajar dan demi kepentingan terbaik defendan untuk membenarkan permohonan 2(c) lampiran 1. Perintah sedemikian jatuh dalam kuasa luas yang diberikan kepada mahkamah oleh s 350 Akta 777 dan selaras dengan objektif bagi tindakan terbitan statutori (lihat perenggan 79 & 81).]

Cases referred to

Dato' Seri Timor Shah Rafiq v Nautilus Tug & Towage Sdn Bhd [2022] MLJU 1545; [2022] 8 CLJ 529, CA (refd)

Dato' Seri Timor Shah Rafiq v Nautilus Tug & Towage Sdn Bhd and another appeal [2024] 3 MLJ 433; [2024] CLJU 486, FC (folld)

Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441, FC (refd)

Fazal Ellahi Oli Mohamed & Anor v KM Oli Mohamed Sdn Bhd [2023] 4 MLJ 302, CA (distd)

Golden Plus Holdings Bhd & Ors v China Idea Development Limited & Ors [2021] MLJU 2532; [2021] 1 LNS 2083, HC (refd)

Ho Num Chon & Anor v Tech-Lab Manufacturing Sdn Bhd [2017] 9 MLJ 32, HC (distd)

Lai Kim Loi v Dato Lai Fook Kim & Anor [1989] 2 MLJ 290, SC (distd)

LeDrew v LeDrew Lumber Co [1988] NJ No 325 (distd)
Lie Kok Keong v Tang Container & Services Sdn Bhd [2004] 1 MLJ 373; [2003] 4 CLJ 288, CA (refd)
Loh Teck Wah v Lim Pang Kiam & Anor [2022] MLJU 2385, HC (distd)
Malayan Banking Bhd (formerly known as 'Mayban Finance Bhd') v Boo Hock Soon @ Boo Choo Soon [2013] 2 MLJ 843; [2012] 1 LNS 971, CA (refd)
Ng Pak Mui v Tay Mary & Ors [2022] 11 MLJ 115, HC (distd)
Por Lin Chiang v Tanjung Aircond Engineering Sdn Bhd & Another [2019] 1 LNS 700, HC (folld)
Sematan Shrimp Hatchery Company v Aqua Fresh Co [2005] MLJU 404; [2005] 7 CLJ 505, HC (refd)
Tai May Chean v United Eastern Resources Sdn Bhd & Anor [2022] 4 MLJ 779, CA (folld)

Legislation referred to

Companies Act 2016 ss 347, 348, 348(4), 350, 350(b)

Lim Chee Wee (with Jasper Tan, Wee Hee, Emily Ho and Kuljeet Kaur) (Jasper Hee Partnership) for the plaintiff.
Daniel Albert (with Ashok K Raman, Shermaljit Singh and Natalie Lim) (AK Raman Nair) for the defendant.

Atan Mustaffa J:

[1] Enclosure 1 is allowed. My broad grounds follow.

TEST FOR LEAVE TO COMMENCE A DERIVATIVE ACTION SATISFIED

[2] The plaintiff, Dato' Seri Timor Shah Rafiq, a director of the defendant company, Nautilus Tug & Towage Sdn Bhd, has filed this application via Enclosure 1 seeking leave to commence a derivative action on behalf of the defendant company pursuant to ss 347 and 348 of the Companies Act 2016. The crux of the dispute revolves around the quantum of monthly management fees paid by the defendant company to its holding company, Azimuth Marine Sdn Bhd ('AMSB'). The plaintiff asserts that the management fees, which had skyrocketed from USD8,000 to USD40,000 and later to USD60,000 per month, are grossly excessive, unsubstantiated and unjustified.

[3] The court finds that the plaintiff has satisfied the test for leave to commence a derivative action under s 348(4) of the Companies Act 2016. The plaintiff has demonstrated that he is acting in good faith and that it appears prima facie to be in the best interest of the defendant company for leave to be granted.

[4] The plaintiff has established an honest belief on his part that good causes of action exist against the proposed defendants with reasonable prospects of success. The contemporaneous evidence shows that despite the plaintiff's repeated requests over a prolonged period from 2016 to 2023, on no less than 27 occasions, the majority directors have refused to provide any satisfactory justification or supporting documents to substantiate the substantial escalation in the monthly management fee paid by the defendant company to AMSB from the initial USD8,000 to USD40,000 and then USD60,000. The only explanation proffered by the majority directors was the vague assertion that AMSB required more resources to handle legal actions commenced by the plaintiff. However, this is contradicted by the evidence that the defendant company's affairs are managed by its own personnel, external solicitors, consultants and auditors who are separately remunerated by the defendant company. Further, the management fee paid to AMSB for supposed litigation support from 1 October 2017 to 31 March 2023 (approximately USD2,640,000) unjustifiably exceeds the actual legal fees paid to the defendant company's solicitors (approximately USD1,975,765).

[5] There are therefore overwhelming grounds for the plaintiff to honestly believe that the defendant company has good causes of action against the majority directors for breaches of their statutory and fiduciary duties in causing the defendant company to make unsubstantiated payments to AMSB, and against AMSB for unjust enrichment at the defendant company's expense. The objective component of the 'honest belief' requirement is also satisfied as the court finds that a reasonable person in the plaintiff's position could hold such beliefs, applying the test in *Dato' Seri Timor Shah Rafiq v Nautilus Tug & Towage Sdn Bhd and another appeal* [2024] 3 MLJ 433; [2024] CLJU 486 (FC).

[6] The court rejects the contention of the majority directors (who, together with AMSB, oppose encl 1) that the plaintiff has no cause of action against AMSB for unjust enrichment. The contemporaneous evidence shows AMSB received the increased management fee without providing proof of the actual costs incurred or work done to warrant such substantial payments. There is therefore a prima facie case that AMSB was unjustly enriched and has no viable defence to justify its enrichment at the defendant company's expense, following *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441. The majority directors' argument that there was a lump sum agreement with AMSB is a matter for trial and does not negate the prima facie case of unjust enrichment.

[7] On the element of collateral purpose, the court finds that the plaintiff is not pursuing the intended derivative action for any ulterior motive unrelated to the defendant company's interests. The majority directors' allegations of collateral purpose are mere conjecture unsupported by evidence. Instead, the

objective evidence demonstrates the plaintiff brought this application as a last resort after exhausting all avenues to seek redress on the defendant company's behalf. The mere existence of other disputes between the parties does not equate to the plaintiff acting in bad faith or for a collateral purpose, following *Tai May Chean v United Eastern Resources Sdn Bhd & Anor* [2022] 4 MLJ 779 (CA) and other authorities. In fact, judgments in the other litigation vindicate the plaintiff's bona fides and concerns over corporate governance in the defendant company.

[8] It plainly appears prima facie to be in the defendant company's best interest for the intended derivative action to be pursued. It is undisputed that as at March 2023, the defendant company paid AMSB USD3,453,066.67 in management fees, of which USD2,112,000 was unsubstantiated. This caused the defendant company to suffer substantial losses, with the management fee exceeding 100% of the defendant company's net profit from 2020 onwards. In light of the majority directors' persistent failure to justify the payments, the intended action has good prospects of enabling the defendant company to recover its losses from the proposed Defendants. This would also serve to prevent further diversions of the defendant company's funds.

[9] In conclusion, the plaintiff has amply fulfilled the requirements under s 348(4) of the Companies Act 2016 for leave to commence a derivative action.

[10] I shall now address the majority directors' particular grounds in resisting the plaintiff's application.

THE PLAINTIFF'S AGREEMENT TO THE INCREASE IN MANAGEMENT FEES

[11] The majority directors resist the plaintiff's application, arguing that the plaintiff is estopped from going back on his agreement to the increase in management fees which he allegedly approved without qualification at the defendant company's Board of Directors meeting on 2 November 2016. The majority directors contend that the plaintiff, having consented to the increase in management fees from USD8,000 to USD40,000 per month at the material time, with the only stipulations being that the increase be budgeted for one year and would only apply as long as the legal matters were ongoing, cannot now resile from his prior approval on the basis of purported variances in AMSB's workload.

[12] The plaintiff unequivocally refutes the majority directors' contentions. While acknowledging that he did vote in favour of increasing the management fees at the 2 November 2016 Board meeting, the plaintiff maintains that his consent was expressly subject to two vital conditions. First, the increased fee of

USD40,000 per month was only to be budgeted for one year from 1 October 2016 to 30 September 2017. Second, the Board had unanimously resolved that the budget for the management fees for the financial years after 30 September 2017 must be reviewed afresh by the Board. Accordingly, the plaintiff asserts that he is duty-bound as a director to insist that any increase in management fees beyond the 2016–2017 financial year must be properly substantiated before being approved.

[13] The central issue that falls for determination is whether the plaintiff, having agreed to the conditional increase in management fees at the 2 November 2016 Board meeting, is estopped from questioning the quantum of the fees and demanding documentary proof to justify the same for the period post 30 September 2017.

[14] To determine this issue, it is imperative to carefully examine the exact terms of the Board's resolution on 2 November 2016 as reflected in the minutes of meeting. The pertinent extract states:

> The Board AGREED for the increase in the management fee of USD40,000 per month as proposed however it should be budgeted only for 1 year accordingly and not for all the remaining years as it will only be applicable whilst the legal matters were ongoing.
>
> The Board then unanimously RESOLVED AND APPROVED the following:
>
> > The revised budget for financial year from 1st October 2016 to 30th September 2017 and the budget for subsequent years are to be reviewed again in the next financial year;

[15] The Board's resolution, couched in clear and unambiguous language, stipulates that the Board's approval for the increased management fee of USD40,000 per month was circumscribed by two important conditions. The first is a time limit restricting the approval to a single financial year from 1 October 2016 to 30 September 2017. The second is the requirement for the quantum of management fees for the subsequent financial years to be subjected to a compulsory review by the Board. Read conjunctively, these two conditions lead to the inexorable conclusion that the plaintiff's consent to the fee increase was a qualified one and cannot under any circumstances be interpreted as an open-ended approval.

[16] It is noteworthy that the plaintiff had specifically insisted on the incorporation of the two conditions to ensure that the Board maintains control over the payment of management fees to AMSB. This was to enable the Board to assess the reasonableness of the fees paid from year to year and to ascertain whether the quantum was commensurate with the actual work done by AMSB in managing the defendant company's affairs. In insisting on these safeguards,

the plaintiff was simply carrying out his statutory and fiduciary duties as a Director to safeguard the defendant company's assets and financial interests.

[17] In my judgment, the plaintiff's agreement to increase the management fee was clearly temporal in nature, limited to one year with the condition that it will be reviewed for subsequent years. I respectfully disagree with the majority directors' position that directors are perpetually estopped from requesting the management fees to be proven and substantiated, just because an increase was previously approved by the Board. This would lead to perverse outcomes whereby a company would be forever bound by an unsubstantiated increase in fees regardless of whether it is justified.

[18] Such an argument was in fact rejected by the Court of Appeal in the shareholders' advance suit (*Dato' Seri Timor Shah Rafiq v Nautilus Tug & Towage Sdn Bhd* [2022] MLJU 1545; [2022] 8 CLJ 529). There, the majority directors raised similar allegations of estoppel, arguing that since Dato' Seri Timor Shah, who is the plaintiff here, had previously approved the shareholders' interests, he is estopped from questioning the legitimacy thereof. Justice Lee Swee Seng in allowing Timor's appeal held at para 119:

> At any rate, we fail to understand how by the minority shareholder having accepted some payments of shareholders' interest, they are then barred forever from disputing the correctness of the shareholders' advances captured in the audited accounts. Timor accepts the fact that if the wrong amount of shareholders' advances would impinge on their portion of the advance, then they would also have to refund the Interest paid and had given an undertaking to that effect. Accepting the argument that the minority shareholder cannot raise this issue of a restatement of the audited accounts would mean that the minority shareholder must continue to approve and accept the shareholders' interest in spite of their belief that the Advances had been wrongly captured in the audited accounts. That would leave no room for repentance after realising one's sins of omission in not raising the objection earlier. That cannot be right in a case where a wrong is discovered later and the focus now has to be how to correct the wrong instead of being complicit in perpetuating a wrong.

[19] It would be a perverse outcome if the plaintiff is now barred from questioning the basis for the continued payment of inflated management fees to AMSB in the years after 2016–2017 simply because he agreed to a time-limited increase at the 2 November 2016 meeting. Such an approach would negate the express conditions imposed by the Board resolution and expose the defendant company to the risk of being overcharged by AMSB in the future without any oversight. This could not have been the intention of the Board when passing the 2 November 2016 resolution, as it would be tantamount to the directors relinquishing their duties to the defendant company.

[20] Citing authorities such as *Fazal Ellahi Oli Mohamed & Anor v KM Oli*

Mohamed Sdn Bhd [2023] 4 MLJ 302 (CA) and *Loh Teck Wah v Lim Pang Kiam & Anor* [2022] MLJU 2385 (HC), the majority directors argue that the plaintiff is estopped from challenging the increase as he had previously consented to it. The majority directors' reliance on these is misplaced and distinguishable from the present factual matrix. In *Fazal Ellahi Oli Mohamed*, the complainant was found to be estopped from challenging the legality of a franchise agreement which he had knowingly executed. In *Loh Teck Wah,* the complainant was not allowed to impugn payments made by the company to its supplier which he had previously approved. However, in both those cases, there was clear evidence that the agreements in question were supported by the complainant's informed and unequivocal consent.

[21] In stark contrast, the plaintiff's consent to the increase in management fees in the present case was expressly contingent on the ongoing legal proceedings and the increase being substantiated with evidence. This is borne out by the plaintiff's contemporaneous objections and repeated requests for proof of the work allegedly done by AMSB to justify the fee increase. The absence of any detailed justification from the majority directors, despite the plaintiff's prodding, further strengthens the plaintiff's assertion that his agreement to the increase was not an unqualified one.

[22] The plaintiff's stance that the increase in management fees must be justified is further fortified by his comments on the draft minutes of the 2 November 2016 Board meeting and averments in his supporting affidavits. In these documents, the plaintiff consistently questioned the rationale for the drastic increase in fees, describing it as a 'preposterous justification'. The plaintiff also repeatedly stated that the majority directors failed to provide any details to explain the increase and that his consent was conditional upon the subsistence of the legal proceedings. The plaintiff's unwavering position is eminently clear from his amendments to the draft minutes of the November 2016 meeting, where he sought to underscore that the fee increase was only approved for one year subject to review.

[23] Viewed in totality, the contemporaneous documentary evidence overwhelmingly supports the plaintiff's contention that he has at all material times been steadfast in his stand that the quantum of management fees paid to AMSB must be fully justified by reference to the actual work done. The majority directors' submission that the plaintiff had given an unqualified consent to the fee increase in perpetuity is thus wholly untenable and must be rejected.

[24] In any event, even if there is any ambiguity in the construction of the Board resolution, the benefit of the doubt must be accorded to the plaintiff who is merely seeking to uphold principles of good corporate governance. The

plaintiff's insistence that AMSB must substantiate the increased management fees with credible evidence before the same can be approved for the years after 30 September 2017 is entirely consistent with his fiduciary obligations as a director to act in the best interest of the defendant company. There is nothing invidious in the plaintiff's actions, as he is simply demanding proof that the management fees paid out of the defendant company's coffers are commensurate with the actual work done by AMSB. To deny him the right to do so would be to subordinate the defendant company's interests to that of AMSB, in flagrant disregard of the directors' duties.

[25] On a thorough evaluation of the evidence in its entirely, I find that the plaintiff is not estopped, either in law or in fact, from seeking documentary proof to justify the increased management fees charged by AMSB to the defendant company for the period post 30 September 2017. The majority directors' argument that the plaintiff's consent to the increase at the 2 November 2016 Board meeting precludes him from questioning the legitimacy of the fees subsequently is fatally flawed and must be rejected.

[26] For the reasons articulated above, I am satisfied that the plaintiff is entitled to exercise his statutory right under ss 347 and 348 of the Companies Act 2016 to bring a derivative action to safeguard the defendant company's interests. The majority directors have failed to demonstrate any estoppel operating against the plaintiff which prohibits him from questioning the quantum of management fees paid to AMSB after 30 September 2017. I find the majority directors' contrary argument on this point to be unpersuasive and is hereby dismissed.

DELAY IN PURSUING THE CURRENT ORIGINATING SUMMONS

[27] The majority directors contend that there has been an inordinate and unreasonable delay of six years on the part of the plaintiff in pursuing the present originating summons since he first challenged the increase in management fees on 14 November 2017. The majority directors argue that the plaintiff had ample opportunity to commence this action much earlier but chose not to do so. Reliance is placed on the decisions in *Fazal Ellahi Oli Mohamed & Anor v KM Oli Mohamed Sdn Bhd* and *LeDrew v LeDrew Lumber Co* [1988] NJ No 325 to submit that the delay casts serious doubts on the plaintiff's bona fides in instituting this action.

[28] The plaintiff vehemently denies the majority directors' allegations. The contemporaneous documentary evidence incontrovertibly shows that the plaintiff brought this application only as a measure of last resort and after repeated attempts to procure justification and supporting documents from the majority directors had proven futile. The plaintiff highlights that since he first

raised his grievance regarding the increase in management fees on 14 November 2017, he had on no less than 27 occasions, both verbally and in writing, implored the majority directors to furnish documentary proof to substantiate the exorbitant quantum of management fees. The plaintiff had also sought explanations for glaring anomalies in the payment of management fees, particularly during the periods of Movement Control Order where all non-essential activities were restricted, and when litigation involving the defendant company was either concluded or held in abeyance.

[29] A chronology of the plaintiff's unrelenting efforts to seek accountability from the majority directors is set out in great detail at para 78 of the plaintiff's reply submissions. It chronicles the 27 instances, spanning a period of six years from 14 November 2017 to 19 September 2023, where the plaintiff had tirelessly sought a breakdown of the management fees as well as an account of the exact services rendered by AMSB to justify the astronomical increase from USD8,000 to USD40,000 and later to USD60,000 per month. These requests were met with either stony silence or vague responses bereft of any documentary evidence. Despite being given every opportunity to vindicate the legitimacy of the payments, the majority directors had persistently failed to produce any credible proof that the quantum of management fees paid to AMSB was commensurate with the actual work done.

[30] Rather than being indolent as alleged, it appears the plaintiff exhibited considerable patience by allowing the majority directors an adequate opportunity to address his concerns before initiating this action. The plaintiff's forbearance in exhausting all informal avenues for redress before resorting to litigation must be viewed as a mark of his reasonableness and good faith, not a lack thereof. As recognised by the Court of Appeal in *Dato' Seri Timor Shah Rafiq v Nautilus Tug & Towage Sdn Bhd* [2022] MLJU 1545; [2022] 8 CLJ 529 at para 171:

> If there is any delay in filing this application for leave, it is that long suffering is a virtue in the circumstances of this case where every opportunity should be given to the majority directors to explain the queries and that a derivative action would be the last straw where all prior overtures had been rebuffed such a delay cannot be equated with a collateral purpose.

[31] The plaintiff's decision to accord the majority directors adequate time to respond to his queries before commencing this action is therefore wholly consonant with the requirements of good faith. To hold otherwise would be to penalise the plaintiff for attempting to resolve the matter internally and incentivise knee-jerk litigation at the first sign of impropriety. This would be anathema to the principles underlying the statutory derivative action.

[32] The majority directors' attempt to impugn the plaintiff's motives by

citing the cases of *Fazal Ellahi* and *LeDrew* is, with respect, misplaced and must be rejected. Those cases involved a delay of ten years which was either unexplained or occasioned by a complete inaction on the complainant's part. This stands in sharp contrast to the present case where the six-year period between the plaintiff's first complaint and the filing of the originating summons is attributable to the plaintiff's considerable efforts in seeking an amicable resolution. There was not a single moment of inaction, as demonstrated by the extensive chronology of the plaintiff's verbal and written requests for information. The delay, if it can even be characterised as such, was not due to any indolence or collateral purpose on the plaintiff's part. Rather, it resulted from the majority directors unfortunately failing to provide a substantive response to the plaintiff's reasonable inquiries.

[33] The Court of Appeal in *Fazal Ellahi* made it abundantly clear that even an inordinate delay will not negate good faith if the same is properly accounted for. In the instant action, the plaintiff had furnished a comprehensive account in his affidavits of the steps taken to procure documentary evidence from the majority directors before seeking recourse to the courts. There is therefore no want of explanation for the time taken to commence the present proceedings. This is a key distinguishing factor from the cases relied upon by the majority directors.

[34] It is also noteworthy that the plaintiff had, in the six years prior to the filing of this action, actively raised the issue of the management fees at various Board meetings. In particular, the plaintiff had tabled a motion to reduce the quantum of the management fees to its original sum of USD8,000 per month at the Board meetings of 22 February 2021, 18 March 2022 and 23 September 2022. The plaintiff's conduct in pursuing this matter internally and providing the majority directors every chance to justify the payments before taking out this originating summons is compelling evidence of his bona fides and militates strongly against any suggestion of delay or collateral purpose.

[35] On a holistic consideration of the evidence, I find that the plaintiff had at all times acted with alacrity and probity in seeking to bring the majority directors to account. The meticulously documented chronology of the plaintiff's endeavours to obtain answers from the majority directors both at formal Board meetings and through informal correspondence leaves no room for doubt as to the plaintiff's good faith in commencing this action. The six-year period between the plaintiff's first complaint and the institution of this originating summons was a consequence of the majority directors' obduracy, not the plaintiff's indolence.

[36] The plaintiff had, with an abundance of caution and care, provided the majority directors every opportunity to vindicate the legitimacy of the

substantial increase in management fees before taking the significant step of instituting a derivative action. This approach was rightly endorsed by the Court of Appeal in the shareholders' advance suit as being consonant with the duty of good faith. The delay, if any, was not inordinate or unreasonable but a necessary result of the plaintiff's painstaking efforts to procure accountability from the majority directors.

[37] The entire factual substratum of the present case is therefore a far cry from that in *Fazal Ellahi* and *LeDrew* where the element of delay was either inexplicable or the product of a protracted period of inaction. Those authorities, which turn on their peculiar facts, are hence readily distinguishable and do not advance the majority directors' case.

[38] For the foregoing reasons, I find that there has been no inordinate or unreasonable delay on the plaintiff's part in commencing the present action which would constitute an abuse of process. The majority directors' submission on this score is unpersuasive and is hereby dismissed.

ABUSE OF PROCESS: PLAINTIFF SEEKING TO ACCESS PRIVILEGED INFORMATION

[39] The majority directors contend that the plaintiff's intended derivative action is an abuse of process as he is purportedly seeking to access privileged information pertaining to the defendant company's conduct in the plaintiff's lawsuits and/or effectively stifle the defendant company from defending against his lawsuits. The majority directors argue that the information ultimately sought by the plaintiff vide the intended derivative action includes matters relating to the defendant company's conduct in the plaintiff's lawsuits, such as the details of staff, consultants or advisors engaged by AMSB as well as the exact work done by them. It is submitted that such information is protected by legal professional privilege and the plaintiff is well aware of this since he had voluntarily excused himself from Board discussions on issues pertaining to his lawsuits.

[40] The plaintiff vehemently denies the majority directors' allegations and contends that this argument is nothing more than a red herring designed to distract from the real issues at hand. The plaintiff highlights that over the years, the majority directors have never once claimed, whether in Board meetings, correspondence or affidavits filed, that his requests for the management fees to be substantiated amounted to a backdoor attempt to access privileged information. This contention is only now raised for the first time in the majority directors' submissions and is plainly an untenable attempt to conjure up a new defence. It is a well-established principle of law that parties cannot be permitted to make submissions on factual matters that were never pleaded or

deposed to contemporaneously, as such submissions are tantamount to evidence from the Bar. Support for this can be found in a long line of authorities including *Lie Kok Keong v Tang Container & Services Sdn Bhd* [2004] 1 MLJ 373; [2003] 4 CLJ 288, *Sematan Shrimp Hatchery Company v Aqua Fresh Co* [2005] MLJU 404; [2005] 7 CLJ 505 and *Malayan Banking Bhd (formerly known as 'Mayban Finance Bhd') v Boo Hock Soon @ Boo Choo Soon* [2013] 2 MLJ 843; [2012] 1 LNS 971.

[41] In any event, even if this argument is considered on its merits, I do not find it to be particularly convincing or substantive. A thorough perusal of the contemporaneous documents exchanged between the parties reveals that what the plaintiff is seeking in the intended derivative action are routine business and commercial documents to prove that AMSB had indeed provided management services commensurate with the exorbitant quantum of management fees charged. The plaintiff had, in the 27 separate requests made to the majority directors over a period of six years from 2 November 2016 to 19 September 2023, asked for information and documents such as the number of staff employed by AMSB, their employment contracts and scope of work, the costs expended by AMSB on salaries and professional fees as well as timesheets showing the exact work done by AMSB's staff in relation to the legal proceedings. These documents are indubitably necessary for the plaintiff to ascertain whether the astronomical increase in management fees from USD8,000 to USD40,000 or USD60,000 per month was justified.

[42] A careful examination of the specific information and documents requested by the plaintiff, as chronicled in para 78 of the plaintiff's reply submissions, shows that none of the items are in the nature of legal advice rendered by the defendant company's solicitors or any other materials that could possibly be protected by litigation privilege. The documents sought are all in the nature of commercial records relating to AMSB's expenditure and services provided in exchange for the management fees paid. There is absolutely no request for any privileged communications between the defendant company and its lawyers. The mere fact that some of the documents may pertain to litigation involving the defendant company does not cloak them with privilege, as they do not entail the disclosure of any legal advice or litigation strategy.

[43] The suggestion that allowing the plaintiff access to standard documents like employment contracts, salary details, and timesheets of AMSB's staff could somehow impair the defendant company's defence in the lawsuits brought by the plaintiff does not seem like a well-supported or tenable position. The plaintiff is not asking for the defendant company's privileged documents but merely seeking evidence that the services rendered by AMSB were proportionate to the management fees paid. It strains credulity to argue that

the disclosure of such documents would stiffle or prejudice the defendant company's position in the legal proceedings commenced by the plaintiff. A

[44] That the majority directors are raising the spectre of privilege as an afterthought is evident from the fact that in the various replies by the majority directors to the plaintiff's requests for supporting documents, not once was the issue of privilege asserted. The relevant extracts of the correspondence, as set out in Annexure A of the plaintiff's written submissions, show that the majority directors had ample opportunities to claim privilege if it was indeed applicable but conspicuously never did so. The ineluctable conclusion to be drawn from this omission is that the majority directors themselves did not genuinely believe that the documents sought by the plaintiff were privileged in nature. B C

[45] With respect, I find the majority directors' reliance on the case of *Ng Pak Mui v Tay Mary & Ors* [2022] 11 MLJ 115 to be somewhat misplaced in this instance. In that case, the documents sought by the plaintiff in the intended derivative action included information passed between the company and its solicitors in respect of suits wherein the plaintiff was the opposing party. It was in those circumstances that Ong Chee Kwan JC (as he then was) found that part of the information sought may be protected by legal professional privilege. The factual matrix of *Ng Pak Mui* is thus fundamentally different from that in the present action, as the plaintiff here is not seeking any of the defendant company's correspondence with its lawyers but only the disclosure of objective evidence to show that the quantum of management fees paid to AMSB was justified. D E F

[46] On a holistic consideration of the evidence and the applicable legal principles, I find that the majority directors' argument on abuse of process to be convincing and ought to be rejected. The majority directors have not shown any credible evidence that the plaintiff is attempting to procure privileged information to stifle its defence in the legal proceedings. The documents sought by the plaintiff are all in the nature of commercial records, not legal advice. The mere fact that some of these documents may relate to the litigation between the parties does not mean that they automatically attract legal professional privilege. If that were the case, a company can conveniently assert privilege over any document even tangentially connected to a legal dispute as a means of avoiding accountability. G H

[47] The majority directors' position that the plaintiff's intended derivative action is an abuse of process, serving as a means to access privileged information, does not seem well-supported. This contention appears to have emerged relatively late, and may reflect an attempt to hinder the plaintiff's claim. Nonetheless, I do not find this argument persuasive based on the I

available evidence. It is in fact the majority directors' obdurate refusal to provide any supporting documents to show that AMSB had rendered services commensurate with the management fees paid that smacks of bad faith and improper purpose. The inference that emerges from the majority directors' conduct is that it has no credible evidence to justify the exponential increase in management fees and is hence seeking to hide behind the cloak of privilege to avoid scrutiny.

[48] In the circumstances, I do not find the majority directors' contention that the plaintiff's intended derivative action amounts to an abuse of process aimed at obtaining privileged information to be well-supported. This appears to be a diversion from the core matters under dispute before the court. The argument on legal professional privilege, which was never once raised contemporaneously but advanced for the first time in these proceedings, is an afterthought that is factually and legally unsustainable. The plaintiff has amply demonstrated that the documents sought in the intended derivative action are all in the nature of routine commercial records that do not attract privilege. I do not find the majority directors' assertion of privilege as grounds to avoid providing justification for the substantial increase in management fees to be a convincing position. Transparency on this issue seems warranted. Accordingly, this argument is dismissed.

ABUSE OF PROCESS: TO MULTIPLICITY OF PROCEEDINGS

[49] The majority directors submit that the plaintiff's intended derivative action is an abuse of process as it would give rise to multiplicity of proceedings, since the issue of the legitimacy of the management fees paid by the defendant company to AMSB is already a live issue before the Court of Appeal in the defendant company's pending appeal against the dismissal of Suit No WA-22NCC-163–05 of 2017 ('Suit 163'). The majority directors argue that in Suit 163, the defendant company had claimed the management fees from the plaintiff and others as part of the general damages allegedly suffered by the defendant company as a result of a purported conspiracy to injure the defendant company. As such, the intended derivative action would result in two different courts trying the same issue and potentially arriving at inconsistent decisions on the legitimacy of the management fees, thereby creating a multiplicity of proceedings. The majority directors rely on the cases of *Lai Kim Loi v Dato Lai Fook Kim & Anor* [1989] 2 MLJ 290 and *Ho Num Chon & Anor v Tech-Lab Manufacturing Sdn Bhd* [2017] 9 MLJ 32 in support of their contention.

[50] The plaintiff vehemently denies that the intended derivative action would give rise to any multiplicity of proceedings. It is submitted that despite sharing the common thread of the legitimacy of the management fees paid to

AMSB, the substance, character and effect of Suit 163 and the intended derivative action are fundamentally different. The plaintiff highlights that in Suit 163, the defendant company had sued the plaintiff, NSSB and Dato' Wan Yaacob bin Salaidin ('Dato' Wan') for conspiracy to injure and breach of duties, whereas in the intended derivative action the plaintiff is suing the majority directors and AMSB for breaches of duties and unjust enrichment on behalf of the defendant company. Further, while one of the heads of general damages claimed by the defendant company in Suit 163 was the increase in management fees paid as a result of the alleged conspiracy, in the intended derivative action the unsubstantiated increase in management fees itself forms the very basis of the action and is claimed as special damages. There are also material differences in the reliefs sought in the two actions.

[51] The plaintiff places reliance on the Court of Appeal's decision in *Tai May Chean v United Eastern Resources Sdn Bhd & Anor* where it was held that the fact that multiple proceedings may arise from the same factual matrix does not ipso facto give rise to multiplicity if the substance, character and effect of the actions are different. Support is also drawn from the High Court's decision in *Golden Plus Holdings Bhd & Ors v China Idea Development Limited & Ors* [2021] MLJU 2532; [2021] 1 LNS 2083 which applied *Tai May Chean* and held that there is no duplicity of proceedings if the causes of action and reliefs sought in the two actions are distinct, even though they may share some overlap in the underlying facts. It is submitted that the majority directors' reliance on *Lai Kim Loi* and *Ho Num Chon* is misplaced as the plaintiffs in those cases had commenced multiple actions based on the same facts and seeking substantially similar reliefs, unlike the present case.

[52] I have given careful consideration to the forceful arguments advanced by the parties. In my judgment, the plaintiff's contentions on this issue are well-founded and ought to be upheld. A close examination of the pleadings in Suit 163 and the intended derivative action shows that while both suits concern the legitimacy of the management fees as a common factual substratum, they are materially different in substance, character and effect.

[53] In Suit 163, the defendant company had sued the plaintiff, Nautilus Supreme Sdn Bhd ('NSSB') and Dato' Wan for alleged conspiracy to injure the defendant company and breach of duties as directors. The defendant company's pleaded case was that the defendants in that suit had by their various acts conspired to disrupt and destabilise the defendant company's operations. The purported increase in management fees paid to AMSB was pleaded as part of the special damages flowing from the alleged conspiracy. The learned judge had dismissed the defendant company's claim for conspiracy in its entirety, including the general damages. The finding on the lack of causation between the alleged conspiracy and the heads of general damages claimed was not

appealed. The live issue in the defendant company's pending appeal therefore does not concern the legitimacy of the management fees per se but whether the alleged conspiracy and breach of duties by the defendants had been made out.

[54] In diametric contrast, the intended derivative action concerns a direct challenge by the plaintiff on behalf of the defendant company against the majority directors and AMSB on the propriety of the management fees. The thrust of the plaintiff's case is that the majority directors had breached their fiduciary duties to the defendant company by approving a colossal increase in the management fees from USD8,000 to USD40,000 and subsequently to USD60,000 per month without any proper justification or supporting evidence that AMSB had provided services commensurate with the fees paid. The plaintiff contends that in acting as such, the majority directors had failed to act bona fide in the best interest of the defendant company and had placed the interests of AMSB, their nominator, above those of the defendant company. It is also alleged that AMSB had been unjustly enriched by receiving management fees exceeding USD2m without valid basis.

[55] The disparity in the substance and character of the two actions is evident from the reliefs sought therein. In Suit 163, the defendant company had claimed for a declaration that the defendants had conspired to injure the defendant company and general damages arising therefrom, which included the increase in management fees paid from October 2017 to January 2019 as a result of the alleged conspiracy. In contrast, in the intended derivative action, the plaintiff is seeking declaratory relief that the majority directors had acted in breach of their fiduciary duties and an order that they are jointly and severally liable to the defendant company to repay the substantial increase in management fees paid from April 2017 to date, which were allegedly unsubstantiated by any documentary proof. The plaintiff is also seeking a permanent injunction to reduce the management fees to its original quantum of USD8,000 or any other sum that can be justified by evidence.

[56] Viewed in its proper perspective, it is abundantly apparent that notwithstanding the common thread of the legitimacy of the management fees, the substratum of Suit 163 and the intended derivative action are worlds apart. The former is premised on establishing a conspiracy to injure the defendant company and a breach of directors' duties arising from certain pleaded acts, of which the increase in management fees is but one of the alleged consequences. The latter on the other hand is a direct challenge by the plaintiff on behalf of the defendant company against the majority directors for breaching their fiduciary duties in approving the exponential increase in management fees without any commercial justification. The intended derivative action also seeks to recover the unsubstantiated increase in management fees in its entirety from April 2017 to date as opposed to only a limited period from October 2017 to

January 2019 as claimed in Suit 163. The dichotomy in the substance, character and effect of the two proceedings is therefore plain and obvious.

[57] I am fortified in this conclusion by two appellate authorities that are on all fours with the present factual matrix. The first is the Court of Appeal's decision in *Tai May Chean v United Eastern Resources Sdn Bhd & Anor* where it was unequivocally held that the fact that two actions arise from the same factual background does not necessarily mean that there is a multiplicity of proceedings. In deciding whether a duplicity of proceedings arises, the focus ought to be on the substance, character and effect of the actions, not the underlying facts. Where the causes of action pleaded and reliefs sought in the two actions are distinct, there can be no multiplicity even though they may share a common narrative. The appellate court expressly cautioned against taking an inflexible approach to the doctrine of multiplicity by placing form over substance.

[58] This principle was subsequently applied by the High Court in *Golden Plus Holdings Bhd & Ors v China Idea Development Limited & Ors* to find that there was no abuse of process where multiple actions arose from the same share allotment agreement. Despite the actions sharing the same factual foundation, there was no duplicity as the pleaded causes of action and reliefs prayed for were separate and distinct. The fact that there may be some overlap in the facts relied upon was not a sufficient basis to stay or strike out the later action on the ground of multiplicity.

[59] Drawing an analogy to the present case, I find that the intended derivative action is not duplicitous of Suit 163 as they are grounded on different causes of action and seek disparate reliefs. The fact that both actions share the common narrative of the legitimacy of the management fees does not, without more, constitute an abuse of process. The fundamental differences in the substance and character of the two actions necessarily means that they can and ought to be allowed to proceed separately, as the findings in one will not determine the outcome of the other. The concerns of inconsistent judicial decisions and vexation to the defendant company do not therefore arise on the facts of this case.

[60] The upshot of the foregoing analysis is that the majority directors' contention that the intended derivative action would give rise to a multiplicity of proceedings is plainly unsustainable and must be rejected. The majority directors' reliance on the cases of *Lai Kim Loi v Dato' Lai Fook Kim* and *Ho Num Chon & Anor v Tech-Lab Manufacturing Sdn Bhd* is, with respect, misplaced as those cases concerned plaintiffs filing multiple actions premised on the same facts and seeking like reliefs against the same defendants. In contrast, the intended derivative action in the present case is against a different set of

defendants and is premised on distinct causes of action and prayers when compared to Suit 163. There is therefore no question of any duplicity or multiplicity of proceedings.

[61] On a consideration of the evidence in its totality, I find that the majority directors have failed to demonstrate any abuse of process or risk of multiplicity arising from the intended derivative action. The majority directors' arguments on this issue are without merit and are accordingly dismissed.

CAUSING THE DEFENDANT COMPANY TO TAKE A POSITION CONTRADICTORY TO THAT TAKEN BY IT IN SUIT 163

[62] The majority directors submit that the plaintiff's intended derivative action would cause the defendant company to adopt a position on the legitimacy of the management fees that is contradictory to the stand it had taken in Suit 163. This, it is contended, would severely prejudice the defendant company's appeal against the dismissal of Suit 163 as it would effectively be an admission by the defendant company that it had previously advanced a case on the management fees that was palpably unsustainable. In support of this argument, the majority directors rely on the High Court's decision in *Ng Pak Mui v Tay Mary* where a similar contention was accepted in refusing leave to commence a derivative action.

[63] The plaintiff does not agree. Whilst accepting that the defendant company had in Suit 163 took the position that the increase in management fees paid to AMSB was legitimate, the plaintiff argues that this cannot be a bar to the defendant company now taking a correct stand in the intended derivative action that the increase is in fact wholly unsubstantiated. The plaintiff contends that there can only be one truth — either the increase in management fees is justified or it is not. The fact that the majority directors have till date failed to produce a single shred of evidence to support the exponential increase in Suit 163 despite repeated requests leads to the irresistible conclusion that the payments to AMSB are indefensible. In such circumstances, the question of the defendant company taking an inconsistent position does not arise as the stand in Suit 163 is demonstrably erroneous and ought to be abandoned. To hold otherwise would be to compel the defendant company to persist in prosecuting an appeal in Suit 163 that is doomed to fail, which cannot be countenanced. It is also highlighted that in any event, the defendant company's claim for management fees as general damages in Suit 163 had already been dismissed by the High Court and does not form the subject matter of the pending appeal.

[64] On a careful consideration of the evidence, I find that the majority directors' argument on the defendant company taking a contradictory position in the intended derivative action is a mere red herring that is both factually and legally unsustainable.

[65] Firstly, it is evident from the chronology of events that the plaintiff had given the majority directors every opportunity to vindicate the substantial increase in management fees paid to AMSB before commencing the present action. The plaintiff had, over a span of six years from 2017 to 2023, issued no less than 27 separate requests to the majority directors to furnish supporting documents to justify the increase from USD8,000 to USD40,000 and subsequently to USD60,000 per month. These requests, the full particulars of which are set out in para 78 of the plaintiff's reply submissions, were met with deafening silence. Despite promising to provide evidence that the increase in management fees was commensurate with the services rendered by AMSB, the majority directors failed to produce any credible or tangible proof. All that was proffered were bare assertions unaccompanied by any documentary evidence.

[66] In the face of this persistent failure to substantiate the substantial increase in management fees, the inference is irresistible that the payments to AMSB are wholly unjustified. Elementary logic dictates that if the majority directors had in their possession documents to show that the increase in management fees was above board, they would have disclosed the same to put an end to the plaintiff's complaints. Their failure to provide the requested evidence despite being given ample time and opportunity strongly suggests that such evidence may not exist. I therefore find that the plaintiff has made out a strong prima facie case that the management fees paid to AMSB, over and above the original sum of USD8,000 per month, are indefensible.

[67] Given these circumstances, it would not be appropriate to uphold the defendant company's earlier stance in Suit 163 that the increase in management fees paid to AMSB was justified. It is trite that there can only be one truth. If the increase is shown to be unsustainable, as the evidence presently demonstrates, the defendant company cannot be precluded from abandoning its earlier erroneous stance and taking the correct position in the intended derivative action that the management fees paid are ultra vires. To hold otherwise would be to compel the defendant company to continue defending a baseless claim in the appeal in Suit 163, which would be inimical to its interest and an abuse of process.

[68] Secondly, it must be noted that in any event, the defendant company's claim for the additional management fees paid to AMSB as part of the general damages in Suit 163 had already been expressly disallowed by the learned High Court judge. The general damages claim was dismissed on the basis that the

defendant company had failed to prove that the alleged losses were caused by the conspiracy and breaches of duty complained of. This finding was not appealed against by the defendant company. The issue of the legitimacy of the management fees therefore no longer arises for consideration in the defendant company's appeal in Suit 163. It is questionable whether the intended derivative action would actually undermine the defendant company's position in the pending appeal.

[69] Thirdly, I find that the majority directors' reliance on *Ng Pak Mui v Tay Mary* is misplaced as that case is clearly distinguishable. In *Ng Pak Mui,* the plaintiff sought to assert in the intended derivative action that the company was insolvent when dividends were declared, which was a complete volte-face from the company's stand in other suits that it was solvent. It was in those circumstances that Ong Chee Kwan JC (as he then was) found that allowing the intended derivative action to proceed would result in the company taking a wholly inconsistent position. Crucially, there was no evidence in *Ng Pak Mui* that the company's original stance in the other suits was erroneous. That is in stark contrast to the present case where there is overwhelming evidence that the defendant company's position in Suit 163 that the increase in management fees was justified is palpably incorrect and ought to be abandoned. The other material difference is that in *Ng Pak Mui*, the issue of the company's solvency was a live issue in the other pending actions, whereas in the instant case the claim for additional management fees in Suit 163 has been dismissed by the High Court and is not the subject of the pending appeal.

[70] Fourthly, it bears reiterating that the majority directors who are responsible for committing the defendant company to the unsustainable position on the management fees in Suit 163 should not be allowed to now assert prejudice to the defendant company as a means to stultify the intended derivative action. It is unconscionable for the wrongdoers to rely on their own improper conduct to effectively deprive the defendant company of the opportunity to recover monies that have been wrongfully paid out by taking a correct position in the intended derivative action. This would be tantamount to allowing the majority directors to profit from their own wrong and would bring the administration of justice into disrepute.

[71] Viewed in totality, I find that there is no reasonable basis for concluding that the defendant company would be prejudiced in defending the appeal in Suit 163 by taking the correct position in the intended derivative action that the increase in management fees paid to AMSB is indefensible. The claim for additional management fees has already been dismissed by the High Court in Suit 163 and does not arise in the pending appeal. In any event, there is clear evidence that the payments are wholly unjustified and the defendant company cannot be prevented from abandoning its previous erroneous stance and

adopting the right position. The majority directors who are responsible for committing the defendant company to an untenable position in Suit 163 cannot be heard to complain of prejudice.

[72] In the final analysis, taking a holistic view of the facts, I find that the majority directors have failed to demonstrate any prejudice to the defendant company in the appeal in Suit 163 arising from the intended derivative action. The argument that leave should be refused because the defendant company would be compelled to take an inconsistent position is factually and legally unsustainable and must be rejected.

PRAYER 2(C) OF ENCL 1

[73] The court finds that prayer 2(c) of encl 1 ought to be allowed pursuant to the wide powers conferred by s 350 of the Companies Act 2016.

[74] Section 350 provides that in granting leave to commence a derivative action under ss 347 and 348 of the Act, the court may make such orders as it thinks appropriate, including giving directions for the conduct of the proceedings and any order as to costs. The language used in the provision is couched in the broadest possible terms and makes it abundantly clear that the court is empowered to grant all necessary ancillary relief to ensure that the interests of the company are protected in a derivative action.

[75] Prayer 2(c) seeks an order that the management fees payable by the defendant company to AMSB be reduced to USD8,000 per month pending the final resolution of the derivative action to be initiated against the majority directors and AMSB. Such an order falls squarely within the purview of s 350(b) as an interim direction for the conduct of the proceedings. It is necessary to preserve the status quo and prevent the defendant company from suffering further losses by continuing to pay exorbitant and unsubstantiated management fees to AMSB until the derivative action is disposed of.

[76] The evidence adduced by the plaintiff shows that despite repeated requests, the majority directors have persistently failed to produce any credible documentary proof that the drastic increase in management fees from USD8,000 to USD40,000 and later to USD60,000 per month is commensurate with the services rendered by AMSB. On the contrary, the contemporaneous records demonstrate that the plaintiff had on 27 separate occasions over a span of six years sought a breakdown of the work done by AMSB to justify the astronomical increase in fees. These requests for information, which include a demand for AMSB's employee details, their employment contracts and scope of work as well as timesheets, were met with deafening silence or unilluminating responses bereft of documentary evidence.

A [77] In the face of this obdurate refusal to substantiate the substantial increase in management fees, the irresistible inference is that the payments to AMSB are wholly unjustified and amount to a wrongful dissipation of the defendant company's assets. The plaintiff has established a strong prima facie case that the majority directors had breached their fiduciary duties to the B defendant company by causing these payments to be made without any commercial justification. In such circumstances, it would be wholly inequitable to allow the defendant company to continue paying the impugned management fees to AMSB until the derivative action is finally determined. To do so would be to put the plaintiff on an uneven keel and render nugatory any C judgment that may eventually be entered in the defendant company's favour.

[78] I am fortified in this conclusion by case law which makes it clear that the court has wide discretionary powers under s 350 to grant any appropriate D ancillary relief in an application for leave to commence derivative proceedings. In *Por Lin Chiang v Tanjung Aircond Engineering Sdn Bhd & Another* [2019] 1 LNS 700, the High Court held that upon granting leave under s 348, it was empowered by s 350 to grant such ancillary reliefs as prayed for by the plaintiff as it was fair, expeditious and appropriate.

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[79] Applying the principles to the present case, I find that a direction for the management fees payable to AMSB to be reduced to USD8,000 per month pending the disposal of the derivative action is an appropriate interim measure that is necessary to safeguard the defendant company's financial interests. F Given the plaintiff's unrelenting but futile efforts to procure documentary proof that the quantum of fees paid is justified, there is a real risk of the defendant company's assets being improperly depleted in the event the derivative action succeeds. An order in terms of prayer 2(c) would prevent this risk from materialising and ensure that the defendant company is protected G from further loss until the dispute is finally adjudicated upon. It would also ensure that the directors do not benefit from their own breaches pending a resolution of the matter.

[80] The majority directors' argument that the plaintiff is estopped from H seeking such an order as he had previously agreed to the increase in management fees ignores the vital qualification that the plaintiff's consent was expressly subject to the condition that the increase would be reviewed annually to determine if it was justified. The Board resolution increasing the fees also stipulated that the budget for the fees in the subsequent financial years would I be reviewed afresh. In the circumstances, the plaintiff is clearly entitled to demand that the majority directors prove that the fees paid in the years after 2017 were warranted by the services provided. The failure to adduce any such proof means that the defendant company should not be required to continue paying the inflated fees in the interim.

[81] For the foregoing reasons, I am satisfied that it is fair, appropriate and in the best interest of the defendant company to allow prayer 2(c) of encl 1. Such an order falls within the wide powers conferred on the court by s 350 and is consonant with the objectives of the statutory derivative action. Accordingly, an order is granted that pending the final disposal of the intended derivative proceedings, the management fees payable by the defendant company to AMSB shall be reduced to USD8,000 per month.

Enclosure 1 allowed.

Reported by Dzulqarnain Ab Fatar